IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 606

UNITED STATES OF AMERICA, *Petitioner*

v.

SAMUEL BAYER, ERENS BAYER and WALTER V. RADOVICH

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT WALTER V. RADOVICH IN OPPOSITION

SAMUEL T. ANSELL,
ROGER ROBB,
Attorneys for respondent Walter V. Radovich

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	3
The Plea in Bar	3
The Incriminatory Statement Introduced in Evidence Against the Respondent	8
Argument	13
The Plea in Bar	13
The Incriminatory Statement Introduced in Evidence Against the Respondent	20
Conclusion	23

TABLE OF CASES.

Anderson v. United States, 318 U. S. 350	21
Burton v. United States, 202 U. S. 344, 381	14
Carter v. McClaughry, 183 U. S. 365, 394	14
Ex parte Costello, 8 F. (2d) 386	19
Gebardi v. United States, 287 U. S. 112-122	15
Grafton v. United States, 206 U. S. 333	13
Lyons v. Oklahoma, 322 U. S. 596	22
Mainning v. United States, 275 Fed. 29, 31	43
McNabb v. United States, 318 U. S. 332	21
Morgan v. Devine, 237 U. S. 632, 641	13
Nardone v. United States, 308 U. S. 338	21
Norris v. United States, 34 F. (2d) 839, 841	15
Silverthorne Lumber Company v. United States, 251 U. S. 385	21
United States v. Dietrich, 126 Fed. 664, 667	15

Page

United States v. Katz, 271 U. S. 354, 355..... 15
United States v. N. Y. C. & H. R. R. Co., 146 Fed. 298.. 15
United States v. Sager, 49 F. (2d) 725..... 15
Watson v. United States, 6 F. (2d) 870..... 21

TREATISES AND MANUALS.

Bishop's Criminal Law (8th Ed.) § 1052, sub. 2..... 13
Manual for Courts Martial, U. S. Army..... 14
Winthrop, *Military Law and Precedents* (2d Ed., 1920) 14, 15, 19

STATUTES.

Article of War 40, 10 U. S. Code, Sec. 1511..... 18
Article of War 50½, 10 U. S. Code, Sec. 1522..... 18
Article of War 70, 10 U. S. Code, Sec. 1542.....2, 18
Article of War 95, 10 U. S. Code, Sec. 1567..... 14
Article of War 96, 10 U. S. Code, Sec. 1568..... 14
Section 37, Criminal Code, 18 U. S. Code, Sec. 88..... 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 606

UNITED STATES OF AMERICA, *Petitioner*

v.

SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENT WALTER V. RADOVICH IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1467-1476) is reported at 156 F. (2d) 964.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 14, 1945 (R. 1476). On September 13, by order of the Chief Justice, the Government's time to file a petition

for a writ of certiorari was extended to October 12, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a written confession taken from the respondent, an Army officer, by a special agent of the Federal Bureau of Investigation, was rendered inadmissible by reason of the fact that it was based upon and derived from an earlier statement taken from the respondent by the same agent while the respondent was being, and after he had been for approximately four weeks, unlawfully held in an Army psychopathic ward.

2. Whether proof of the allegations of the indictment against the respondent would have sustained certain military charges under which the respondent had previously been convicted.

STATUTES INVOLVED

Section 37 of the Criminal Code, 18 U. S. C. 88, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Article of War 70, 10 U. S. C. 1542, provides in part:

> No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of

justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the testimony taken on both sides.

Before directing the trial of any charge by general court martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court martial may direct. When a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

STATEMENT

The Plea in Bar

The indictment against Radovich, Samuel Bayer and Elias Bayer (R. 8-11) alleged that beginning on or about September 1, 1942, and continuing up to and including the date of the indictment (July 12, 1945), the three named de-

fendants, and divers other persons whose names were to the grand jurors unknown, conspired

> to defraud the United States of its right to the conscientious, faithful, disinterested and unbiased services and judgment of officers of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud and, more particularly, its right to the conscientious, faithful, disinterested and unbiased services and judgment of the defendant Walter V. Radovich as an officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud.

The indictment further alleged that it was a part of the conspiracy

> that defendants Samuel Bayer and Elias Bayer would during the period aforesaid give sums of money amounting to approximately $7,000 to the defendant Walter V. Radovich, an officer of the United States Army, and a person acting for and on behalf of the United States in an official function under and by authority of the War Department, to wit, a Captain of the United States Army, with intent to influence the action of said defendant, Walter V. Radovich, and to induce him, in violation of his lawful duty, to transfer Private Martin Bayer, and Private Melvin Usdan, both soldiers in the United States Army, from and to various units of the United States Army in order that the said soldiers would not be attached to and be members of a unit of the United States Army which was about to be sent out of continental United States.

Before trial Radovich filed a plea in bar, setting up that he had previously been convicted and sentenced by a general court-martial for the same offense charged in the indictment. His plea in bar was as follows (R. 13):

> Now comes WALTER V. RADOVICH, one of the defendants herein, and pleads in bar to the indictment herein against him as follows:
>
> 1. On June 11, 1945, this defendant, then and now an officer of the United States Army, before a United

States general court-martial having jurisdiction of the defendant and the offense charged, was arraigned upon charges preferred against him, pleaded not guilty, was tried, and on June 29, 1945, was convicted and sentenced by said general court-martial. A copy of said charges, findings, and sentence are herewith, Exhibit A.

2. Thereafter on July 12, 1945, a grand jury, duly empaneled in the District Court of the United States, Southern District of New York, returned in said court the indictment herein charging the defendant with the same offense as that for which he was tried, convicted and sentenced by said general court-martial.

WHEREFORE, defendant prays that the said indictment against Walter V. Radovich be dismissed.

Exhibit A

RECORD OF TRIAL OF RADOVICH, WALTER V., MAJOR, AIR CORPS, MITCHEL FIELD, NEW YORK, BY GENERAL COURT-MARTIAL APPOINTED BY THE COMMANDING OFFICER, HEADQUARTERS FIRST AIR FORCE, MITCHEL FIELD, N. Y.—TRIED AT AIR BASE, MITCHEL FIELD, N. Y., 11, 27, 28, 29 JUNE 1945.

ARRAIGNMENT

The accused was then arraigned on the following charges and specifications—

CHARGE I: Violation of the 95th Article of War.

[ART. 95. *Conduct Unbecoming an Officer and Gentleman.*—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service. Title 10, U. S. C., § 1567.]

SPECIFICATION 1: In that, Major Walter V. Radovich, (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and

Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York.

SPECIFICATION 2: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at Goldsboro, North Carolina, on or about 1 December, 1943, wrongfully and unlawfully accept and receive from Elias Bayer the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement.

CHARGE II: Violation of the 96th Article of War.

[Art. 96, *General Article*.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court. Title 10, U. S. C. § 1568.]

SPECIFICATION 1: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York.

SPECIFICATION 2: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at Goldsboro, North Carolina, on or about 1 December 1943, wrongfully and unlawfully accept and receive from Elias Bayer,

the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement.

FINDINGS

Neither the prosecution nor the defense having anything further to offer, the court was closed and voted in the manner prescribed in Articles of War 31 and 43. Upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, the court finds the accused:

Of Specification 1 of Charge I:	Guilty
Of Specification 2 of Charge I:	Guilty
Of Charge I	Guilty
Of Specification 1 of Charge II:	Guilty
Of Specification 2 of Charge II:	Guilty
Of Charge II	Guilty

SENTENCE

The court was closed, and upon secret written ballot two-thirds of the members present at the time the vote was taken concurring, sentenced the accused to be dismissed the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three (3) years.

The Government demurred to the respondent's plea in bar (R. 20). After argument the demurrer was sustained and an exception noted (R. 85). In sustaining the demurrer the District Court said (R. 83, 84):

> As to the plea of former jeopardy, filed by defendant Radovich, he asserts therein that he has heretofore been tried by a court-martial and convicted of substantially the same offense as alleged in the indictment here, and that by virtue of the constitutional provision

against double jeopardy, this prosecution must be dismissed. The Government, by its demurrer, admits the specific facts set out in the plea, but contends that the offense here charged is a different one, and therefore the constitutional provision against double jeopardy does not apply.

The defendant contends that, since court-martial and district courts are courts of the same sovereign, that is, the United States, the constitutional inhibition against double jeopardy applies to prosecutions in such courts. Grafton v. United States, 206 U. S. 333. I agree with this contention. So the crux of the situation here is whether or not the offense charged against Radovich in the indictment here is substantially the same as the offense for which he was tried by a court-martial.

The District Court held that the offense charged in the indictment was not substantially the same as the offense for which Radovich was tried by court-martial.

By motions at the close of the Government's case (R. 446) and again at the close of all of the evidence (R. 949) the respondent renewed his plea in bar. Both motions were overruled.

The Incriminatory Statement Introduced in Evidence Against Radovich

The Government offered in evidence against Radovich a written statement made by him to Special Agent Flynn of the Federal Bureau of Investigation on March 15 and 17, 1945. This statement, which was marked "Government's Exhibit 25" (R. 1306) and was admitted in evidence over the objection and exception of the respondent (R. 659), was the basis of the case against Radovich. The statement was in the handwriting of Flynn and was initialed and signed by Radovich. According to the statement, Radovich told Flynn that in consideration of $7,000 paid to him by Samuel and Elias Bayer during the summer and fall of 1943, he had transferred Privates Martin Bayer and Melvin Usdan to certain units of the United States Army which were not to be sent out of the continental United States.

In the absence of the jury, the Court heard testimony bearing upon the admissibility of the respondent's statement (R. 533-660). The statement having been admitted in evidence, the testimony heard by the Court in the absence of the jury was in large part repeated before the jury.

The evidence disclosed the following facts respecting the statement taken from Radovich by Special Agent Flynn on March 15 and 17, 1945:

Special Agent Flynn testified that he took the statement from Radovich at the office of the Federal Bureau of Investigation at New York City; that Radovich, who at this time was stationed at Mitchel Field, Long Island, New York, came to Flynn's office at the request of Flynn; that Flynn warned him that his statement might be used against him, etc.

Flynn testified (R. 538-540; R. 677 et seq.) that before taking the statement on March 15 and 17, 1945, he produced and showed to Radovich another written statement which he had taken from Radovich on September 5 or 6, 1944; that this previous statement was "basically" the same as the one Radovich gave on March 15 and 17, 1945; that before taking the new statement, Flynn read over the previous one and then handed it to Radovich, who also read it over; that the old statement was on Flynn's desk when he wrote the new one; that he produced the old statement at the suggestion of Radovich. *The March 15-17 statement on its face purported to be a "supplementary" statement.* (R. 1306) Flynn admitted that he included in the new statement, not all that Radovich told him, but only "most of what I considered important," although he said that he did not leave anything out "with any design." (R. 673)

A request by counsel for Radovich that the District Attorney produce the prior written statement was denied by the District Attorney and by the Court, the ground of the Court's denial being that there was no material conflict between the two statements (R. 551, 552; 681; 901).

The evidence further showed that Radovich returned to the United States from Burma in the late spring of 1944.

(R. 720, 746, 752). On August 3, 1944, while stationed at the Santa Monica Redistribution Center, Santa Monica, California, not far from his home in Los Angeles (R. 728), he was ordered to report to Mitchel Field, New York. (R. 733, 734) On August 9, 1944, having reported at Mitchel Field, he was placed under arrest and incarcerated in the psychopathic or "nut" ward in the Station Hospital at the Field. (R. 591, 766, 573, 782) His uniform was taken from him and locked up and for clothes he was given only hospital pajamas without a string to tie up the pants, and a bathrobe without a cord. (R. 561, 736) He was deprived of his razor, toilet articles, money, and all personal belongings. (R. 561 et seq., 736). He was placed in a small room or cell approximately 9 by 6 feet and a guard was assigned to watch him constantly, night and day, even when he went to the bathroom. (R. 561-564, 738, 782-787) The other inmates of the ward were mental cases, drug addicts and alcoholics. (R. 564, 733) The ward was entered through a heavy steel door similar to that used in jails which was kept locked, and the windows of the ward, including that of the respondent's room, were covered with heavy steel grille work which was also locked. (R. 562 et seq., 734 et seq., 782-787) The respondent was 3,000 miles from his home and friends. He was not permitted to receive visitors or to use the telephone. (R. 567-569, 737, 576) He did not have counsel. (R. 569, 783, 785, 789-790) His food was served on a tin plate, with no knife, and later he was deprived of both knife and fork, and was required to eat with a spoon. (R. 565, 737) There was nothing whatever wrong with the respondent at this time. (R. 568, 742) After some two weeks of such incarceration, he was permitted a brief exercise period each day, in the company of an armed guard. (R. 573, 781) Although it appeared that he was being held by the military authorities for trial under the 95th and 96th Articles of War, on charges growing out of his transactions with Samuel and Elias Bayer, charges were not served upon the respondent as required by the 70th Article of War (10 U. S. C. A. 1542) nor was he taken before a committing

magistrate for arraignment upon any charges preferred against him in the civil courts. (R. 805) The respondent was being held under these circumstances when he made the statement to Agent Flynn on September 5 or 6, 1944.

The evidence showed that Radovich was released from the psychopathic ward on September 16, 1944 (R. 591-593, 766, 767); that from September 16, 1944 until January 2, 1945, he was restricted to the confines of Mitchel Field; and that from January 2, 1945 to and including the date of the supplementary statement to Agent Flynn on March 15-17, 1945, he was under "administrative restraint," which meant that he could not leave Mitchel Field without the personal permission of the Base Commander. (R. 595, 768)

The record made in the absence of the jury showed that the respondent was finally served with military charges on May 30, 1945. (R. 587, 588) The official report of the Staff Judge Advocate, made pursuant to the 70th Article of War (10 U. S. C. A. 1542), stated (R. 606):

> Delay. The charges were preferred on 10 August 1944. Investigation completed about 24 August 1944 and received at this headquarters 25 August 1944.
>
> The delay referring them (charges) for trial was at the specific request of the United States Attorney, Southern District of New York, who was taking action with a view to prosecution of the two civilians involved in paying the bribes to the accused.

The evidence taken in the absence of the jury also showed that on August 21, 1944, while confined in the psychopathic ward, Radovich tendered his resignation from the Army of the United States, for the good of the service. (R. 596) This resignation was not forwarded to the Adjutant General by the respondent's commanding officer until January 27, 1945. (R. 597) The War Department refused to accept the resignation. (R. 600) On March 8, 1945 the respondent's commanding officer at Mitchel Field was advised of this action by the War Department, and ordered to inform Radovich. (R. 600) The respondent, however, was not

informed until after March 20, 1945, (R. 600, 601) several days subsequent to his statement to Agent Flynn. In forwarding the respondent's resignation to the War Department, under date of January 27, 1945, respondent's commanding officer at Mitchel Field stated "The delay in forwarding this resignation was caused by the fact that the United States Attorney, Southern District of New York, New York City, requested that no action be taken in this case until he completed his investigation against the civilians who paid the bribe money." (R. 597)

At the hearing in the absence of the jury, Assistant United States Attorney Edward C. Wallace testified (R. 607 et seq.) that he talked to Major Radovich on several occasions prior to March 15, 1945; that the first talk occurred on or about November 10, 1944; that the talks took place in Mr. Wallace's office, and Agent Flynn was usually present; that when Mr. Wallace talked to Radovich he, Radovich, was justified in assuming that he was not going to be indicted, since it was not the policy of the United States Attorney to proceed against military personnel who were subject to military discipline.

Upon the foregoing evidence, the District Court ruled as a matter of law that the statement made by the respondent to Agent Flynn on March 15-17, 1945 was voluntary and admissible. (R. 655 et seq.) The respondent duly excepted. (R. 659, 660)

The District Court instructed the jury as follows with respect to the written statement made by the respondent to Special Agent Flynn on March 15-17, 1945 (R. 1140):

> Upon evidence which I heard during your absence I concluded, and held as a matter of law, that each of the statements of the defendants which has been introduced in evidence was admissible because not coerced nor induced by promises, and purely for your consideration of the guilt or innocence of the person making the statement.
>
> I have also admitted for your consideration testimony in regard to the circumstances existing at the time and place of the making of these statements for your

consideration, not on the question of whether the statements should have been admitted into evidence, but for such bearing as such facts and circumstances might have in your judgment on the weight and credibility of the statement. In other words, the primary question for you to determine in regard to these statements is whether or not they are true, or how much of them is true. It is entirely within your function to believe all of any statements or any part thereof, or none. And you should, of course, compare what is said in the various statements with the other facts and circumstances disclosed by the other evidence in the case.

Exception to the Court's charge was duly noted, (R. 1143).

ARGUMENT

The decision of the Circuit Court of Appeals was plainly right, and there is no conflict.

1. The Plea in Bar.

Proof of the allegations of the indictment would have sustained the military charges under which the respondent had previously been convicted. The trial of the respondent upon the indictment, therefore, put him twice in jeopardy for the same offense.

It is established that one convicted by a military court of competent jurisdiction cannot be tried a second time in a Federal civil court for the same offense. *Grafton* v. *United States*, 206 U. S. 333. The question therefore is whether or not the offense of which the respondent was convicted and sentenced by general court-martial was the same or substantially the same as that alleged in the indictment. In answering that question "The test is, whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second can not be maintained; when there could not, it can be." *Manning* v. *United States*, 275 Fed. 29, 31 (C. C. A. 8; 1921), citing Bishop's Criminal Law (8th Ed.) § 1052, subd. 2; *Morgan* v. *Devine*, 237 U. S. 632, 641, 35 Sup. Ct.

712, 59 L. Ed. 1153; *Carter* v. *McClaughry*, 183 U. S. 365, 394, 22 Sup. Ct. 181, 46 L. Ed. 236; *Burton* v. *United States*, 202 U. S. 344, 381, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362.

Proof of the allegations of the indictment would have supported the conviction of the respondent under the military charges and specifications. This becomes apparent when the charges and specifications are considered in the light of military law and precedent.

The 95th and 96th Articles of War, 10 U. S. Code, Sections 1567, 1568 (formerly the 61st and 62nd Articles) are military common law articles.[1] Conduct which violates them must be specified but need not be, and usually is not, given a name; whether conduct does or does not violate the Articles, is determined by the court-martial in the light of service custom and precedents. According to military common law, conduct which in any manner defrauds, or tends to defraud, the Government of its rights, or which violates or neglects official duty, or prejudices military command and good order and discipline, *including* conspiracies, is cognizable under those articles. ***In fact, any conspiracy to defraud the Government, except the particular fraud specified in Article 94, 10 U. S. Code Section 1566, must be charged under Articles 95 and 96.*** In other words, the charge made in the indictment was cognizable under the 95th and 96th Articles of War and only under those Articles. See Manual for Courts Martial U. S. Army (United States Government Printing Office 1943) 186, 187; Winthrop, *Military Law and Precedents* (Second Edition, 1920) 710 et seq.; 720 et seq.

If at the trial of the respondent by the court-martial, under the military charges and specifications actually pre-

---

[1] Article 95, 10 U. S. C. Sec. 1567. *Conduct unbecoming an officer and gentleman.* Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

Article 96, 10 U. S. C. Sec. 1568. *General article.* Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court martial, according to the nature and degree of the offense, and punished at the discretion of such court.

ferred against him, the proof had shown only those things charged against him in the indictment—that is, if the proof had fallen short of showing the consummated act of accepting and receiving money fom the Bayers, but had shown a corrupt agreement by Radovich, which contemplated the giving of money to him by the Bayers, to induce him to transfer the named soldiers—then under age-old military practice the particular military specification would have been amended by the court-martial to conform to the proof and a conviction under the charges as they stood would have followed.

In this connection it is important to observe that the military charge that Radovich accepted and received money from the Bayers "*for the purpose of effecting the transfer*" of the named soldiers necessarily imported an agreement and concurrence between Radovich and the Bayers. *Gebardi* v. *United States*, 287 U. S. 112-122; *United States* v. *Katz*, 271 U. S. 354, 355; *Norris* v. *United States*, 34 F. (2d) 839, 841; *United States* v. *Dietrich*, 126 Fed. 664, 667; *United States* v. *N. Y., C. & H. R. R. Co.*, 146 Fed. 298; *United States* v. *Sager*, 49 F. (2d) 725. The military charges, therefore, clearly included in their scope an agreement or conspiracy to pay and receive money, and thus to defraud the United States as alleged in the indictment; and a finding by the court-martial that Radovich corruptly agreed or conspired to accept and receive money would have been entirely consistent with the charges, would have been proper under military law, and would have supported a verdict of guilty of the charges.

The flexibility of military charges and specifications, the wide latitude allowed to a court-martial in making findings thereunder, and the vast scope of the 95th and 96th Articles of War, are well illustrated by the following quotations from Winthrop, *Military Law and Precedents* (Second Edition, 1920) 380, 381, 383, 384:

> Where a court-martial determines that the accused is guilty of a *specification* but not precisely as laid, that is to say is guilty of a part but not of the remainder, or is guilty of the substance of the entire specification

but not of certain details, it may, and it is its duty, in convicting him thereon, to except specifically from the finding of Guilty such portions as are not proved, and thus declare the *exact measure* of the criminality deemed to be established. Thus, it may find him Guilty of the facts set forth in certain of the averments, and Not Guilty of those set forth in certain other averments; or it may find him Guilty of the specification as a whole except only as to certain designated words, amounts, articles, quantities, or other matters of description set forth therein. Having thus shaped its finding on the specification according to the proof, it may find the accused Guilty of the *charge*, provided of course there is enough left in the specification to support the charge.

* * * * * * * * *

The authority of a court-martial to make a partial finding is not limited to the mere making of exceptions. Where, while the allegations in a specification are substantially made out, certain items therein are not precisely proved as averred, the court, in excepting the same, may *substitute* the true facts or details as established by the evidence. As, for example, where sums of money, numbers of things, kinds of quantities of articles, species of military stores, etc., words spoken, names of persons, dates, or places, have been incorrectly set forth in the specification, and the true particulars have been disclosed in the course of the testimony on the trial; in such cases the court, in its finding of Guilty, may and properly will except the erroneous and substitute for them the correct statements or words of description. The authority to make substitution is subject to the same conditions as the authority to make exceptions, *viz.*, that the specifications shall not be rendered legally defective, or the nature of the offence so modified that the finding upon the specification will not support a conviction upon the charge.

In regard to the authority to except and substitute in findings, it may be remarked that it is certainly one of no little practical value and convenience. By its exercise defects in the pleadings may to a considerable extent be remedied, and variances between the pleadings and the proof be in the main cured. Moreover, the finding is thus made to correspond with the precise

facts of the case, justice to both sides is more nearly done, and the accused is the more effectually protected against a second prosecution based upon the same transaction.

* * * * * * * * *

Though at one time otherwise ruled, it is now fully settled by the uniform practice of the service that where the charge is of one of the specific designated offences made punishable by the Articles of War other than the general, or 62d Article, and the evidence fails fully to sustain the charge as laid, but fixes upon the accused a neglect of duty or disorder as involved in the acts alleged in the specification, the court may properly find him Guilty of the specification, (with such exceptions, etc., as may be required) and Not Guilty of the charge but Guilty of Conduct to the prejudice of good order and military discipline.

This finding, of an offence in violation of the General Article under a charge for a violation of a specific Article, was first sanctioned where the charge was 'Conduct unbecoming an officer and a gentleman,' in violation of Art. 61, and is still most frequently resorted to thereunder. It has since, however, been extended *to all cases of charges of specific offences* made punishable by the code, having been especially applied to such as Disobedience of Orders, Disrespect to a commanding officer, Mutiny, Misbehavior before the enemy, Breach of Arrest, Violations of Art. 60, and—in time of war—Violations of Art. 58.

The legal theory upon which this form is based is that it is a finding of a *lesser included offence*, every specific offence being viewed as including either *a neglect of duty or a disorder in breach of discipline;* and it is resorted to in order to prevent the failure of justice which would in general be incurred were it not availed of.

As the record shows the respondent and his counsel have had no notice from the War Department as to the disapproval of the court-martial conviction of Radovich; nor were the opinion and order disapproving the conviction produced at the hearing upon the respondent's plea in bar. In this situation the District Court decided the matter upon

the plea and the Government's demurrer admitting the facts set out in the plea—including the fact of the respondent's military trial and conviction. The petitioner now states, upon information from the office of the Judge Advocate General, that the court-martial conviction of Radovich was disapproved by the War Department because of an error of law (Petition, p. 22). The Government admits that "no rehearing by court-martial under Article of War 50½ (10 U.S.C. 1522) was ordered."

The authority for the petitioner's departure from the record, by reference to information received from the Judge Advocate General, is not apparent to us. As the Circuit Court of Appeals held, the facts respecting the approval or disapproval of the respondent's court-martial conviction may be determined upon a rehearing of this matter. Certainly the facts should not be determined upon ex parte statements by the petitioner.

Upon the petitioner's own statement, however, it is apparent that a plea of former jeopardy by Radovich would be good. Article of War 40 (10 U.S.C. 1511) provides in part:

> No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial, in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.

Article of War 50½ (10 U.S.C. 1522) provides in part:

> When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. * * * *Provided, That such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial legally insufficient to support the findings or sentence.*

or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless, in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority. (Emphasis supplied)

According to the petitioner no rehearing was ordered at the time the conviction of Radovich was disapproved (Petitioner's Brief, p. 22). As the petitioner correctly states, a direction for rehearing must be made at the same time as the action disapproving the sentence; it cannot be made later (Petitioner's Brief, p. 32). It thus appears from the petitioner's own statement that the reviewing and confirming authority has taken "final action" within the meaning of Article of War 40; that is the reviewing and confirming authority has finally disapproved the court-martial conviction. No further action can be taken in the case, by rehearing. Moreover, Article of War 50½ requires that in a case such as the one at bar, where it is held by the Board of Review and the Judge Advocate General that errors of law have been committed injuriously affecting the substantial rights of the accused, a rehearing *shall* be had unless the findings and sentence are approved in part only, or the record is returned for revision, "*or unless the case is dismissed by order of the reviewing or confirming authority.*" Since in this case no rehearing was ordered, and since there is no suggestion that the findings or sentence were approved in part only or that the record was returned for revision, it follows that the case must have been dismissed by order of the reviewing or confirming authority. In any event, whether the case was dismissed, or the conviction merely disapproved without direction for a rehearing, a retrial of the military charges is barred. See *Ex parte Costello*, 8 F. (2d) 386 (D.C.E.D. Va., 1925, Opinion by Groner, J.); Winthrop, Military Law and Precedents (Second Edition, 1920) 260. And if a retrial of the military charges is barred,

then the trial of the respondent for the same offense in the Federal criminal court is likewise barred.

2. The Incriminatory Statement Introduced in Evidence Against Radovich

The 70th Article of War, 10 U. S. Code Section 1542, provides:

> When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for trial by general court-martial, the commanding officer will within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay.

The evidence at the trial, which we have summarized above, disclosed that Radovich was confined and held in flagrant violation of the 70th Article of War. Not only that, but his confinement was under circumstances of great hardship and oppression. After about a month of such confinement, on September 5 or 6, 1944, he made to Special Agent Flynn a written statement. This written statement was used by Special Agent Flynn in obtaining from Radovich on March 15 and 17, 1945, the statement which was introduced in evidence against Radovich. The March 15-17 statement purported on its face to be a "supplementary" statement and the evidence showed conclusively that it was in fact based upon and derived from the earlier statement taken from Radovich while he was unlawfully held in the phychopathic ward—the second statement was clearly the fruit of the first.

It should be emphasized that the delay of the military authorities in serving charges upon Radovich was at the ex-

press request of the United States Attorney. It should also be noted that the record showed that at the request or suggestion of the United States Attorney the military authorities delayed action upon the appellant's resignation for the good of the service—that is the military authorities postponed decision as to whether or not they would try Radovich, and postponed the service of charges upon him. It is significant also that the military authorities did not inform Radovich that his resignation would not be accepted and that he would be tried, until several days after Radovich had made the March 15-17 statement to Special Agent Flynn.

The statement made by Radovich to Special Agent Flynn, while Radovich was unlawfully confined in the psychopathic ward, was clearly inadmissible under the rule of *McNabb* v. *United States*, 318 U. S. 332, and *Anderson* v. *United States*, 318 U. S. 350. Since the statement taken by Flynn in March was obtained by the use of the statement taken in the psychopathic ward, and was admittedly derived from the earlier statement, the March statement was likewise vitiated. *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385; *Nardone* v. *United States*, 308 U. S. 338; *Watson* v. *United States*, 6 F. (2d) 870. As this Court said in *Nardone* v. *United States*, 308 U. S. 338

> To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' What was said in a different context in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392, 64 L. Ed. 319, 321, 40 S. Ct. 182, 24 A. L. R. 1426, is pertinent here: 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.'

The petitioner argues that Radovich was informed of the nature of the complaint against him during the preliminary investigation of the charges (Petitioner's Brief, p. 26). Pe-

titioner concludes that, if Radovich was so informed of the nature of the complaint against him, this excuses the flagrant violation of Article of War 70 by his long detention without the service of charges. This argument is, of course, unsound. The basis of the decision of the Circuit Court of Appeals is that Radovich was and had been for weeks unlawfully detained when he made his first statement to Flynn. The fact—if it is a fact—that the authorities may have complied with some of the provisions of Article of War 70 in connection with the investigation cannot excuse or wipe out the fundamental lawlessness of their detention of Radovich. The statute required that Radovich be promptly served with the formal charges upon which he was to be tried, or that he be released. He was not served, nor was he released. Information as to the "nature of the complaint" was, of course, not a legal or practical substitute for the service of written charges; the "nature of the complaint" and the precise written charge are two very different things.

The decision of the Circuit Court of Appeals is not in conflict with *Lyons* v. *Oklahoma*, 322 U. S. 596. In that case, after improper coercive methods were used to obtain a confession, a second statement was made in another place and with different persons present; and the second statement was used at the trial. This Court held that the second statement was not shown to have been the unavoidable outgrowth of the first, and that the introduction in evidence of the second statement therefore did not constitute a violation of due process. In the case at bar, however, the second statement purported on its face to be "supplementary" to the first and it was made to the same agent who had taken the first, under such circumstances that the conclusion that it was based upon and derived from the first statement is inescapable. Furthermore, the decision in *Lyons* v. *Oklahoma* did not involve a violation of a statute requiring prompt arraignment or prompt service of charges; on the contrary the decision depended only upon the question whether or not the effect of prior coercion had *in fact* been dissipated

before a second confession was made. In other words, the principle of the *McNabb* and *Anderson* cases was not involved in the *Lyons* case.

CONCLUSION

The decision below is clearly correct. There is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

SAMUEL T. ANSELL,
ROGER ROBB,
Attorneys for respondent
Walter V. Radovich.